APPENDIX A

1—*Opinion Below*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Filed Jan. 20, 1956. Harry M. Hull, Clerk

Civil Action No. 1038-56

A. W. Horton, John C. Fryer, and Camarge Trading Co., Inc.,
Plaintiffs,
v.
George M. Humphrey, Secretary of the Treasury, and United States Tariff Commission,
Defendants.

Before: Washington, Circuit Judge, and Wilkin and McGuire, District Judges, holding a statutory three-judge court.

Washington, Circuit Judge: Plaintiffs are importers of cast iron soil pipe from the United Kingdom. They are threatened with application of a "special dumping duty" under the Anti-Dumping Act of 1921, as amended, 19 U.S.C. § 160 *et seq.* (1952). They ask a declaratory judgment that the Act is in violation of the United States Constitution, that certain procedures under the Act or under the Administrative Procedure Act have not been complied with, and that certain findings of the Secretary of the Treasury and the United States Tariff Commission, defendants here, are invalid. For these reasons, they ask that the Secretary of the Treasury and his agents and subordinates be enjoined from further action under the Anti-Dumping Act with respect to their pipe imports.

Because one of the reasons given for seeking issuance of the injunction is alleged repugnance of the Anti-Dumping Act to the Constitution, a three-judge district court has been convened. 28 U.S.C. § 2282 (1952). Plaintiffs urge two constitutional contentions. The first is that the effect of the Act is retroactive, in that the dumping duty may be imposed on goods imported up to 120 days prior to the time the question of dumping was first raised by or presented to the Secretary of the Treasury, and in that the time when the question is first raised or presented to the Secretary of the Treasury may itself be substantially before the importer first hears of the proceeding or of the possibility of an additional duty being imposed. This, they say, deprives plaintiffs of their property without due process. The second contention is that the failure to define important terms in the Act constitutes an invalid delegation of legislative power because it leaves the Secretary of the Treasury and the Tariff Commission free to act without any legislative standards to guide them.

The Anti-Dumping Act has long since been ruled constitutional by the Court of Customs and Patent Appeals, *Kleberg & Co.* v. *United States*, 21 C.C.P.A. 110, 71 F. 2d 332 (1933); *C. J. Tower & Sons* v. *United States*, 21 C.C.P.A. 417, 71 F. 2d 438 (1934), and by the Second Circuit, *Kreutz* v. *Durning*, 69 F. 2d 802 (1934). However, particularly since the Supreme Court has not passed on the matter, we feel that at least the questioned portion of the Act, which is being applied here and which is alleged to impose the tax retroactively, involves sufficient constitutional problems to warrant the holding of a three-judge court—provided jurisdiction of these problems is not placed elsewhere. In the instant case the complaint asserts that the tax will be applied to importations starting on April 21, 1954,[1] and that there was no notice to plaintiffs that would warn them of

[1] Apparently this date is not a matter of administrative record but merely established by informal advice to plaintiffs; as of the administrative record the extent of retroactivity appears to be still undefined.

risk of liability for the duty until midsummer 1955. Taking these allegations at their face value, the hardship to plaintiffs is apparent.[2]

Nonetheless, we think that the complaint must be dismissed. The imposition of a duty may under the statutory plan be reviewed by the Customs Court and the Court of Customs and Patent Appeals (with recourse to the Supreme Court through petition for certiorari). This statutory form of review has been held, in comparable situations, to constitute an adequate remedy at law and therefore to bar equitable relief, and to be the exclusive method of review. *Boston Wool Trade Ass'n* v. *Snyder*, 82 U.S. App. D.C. 144, 161 F. 2d 648 (1947); *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (4th Cir. 1938); *cf. Kreutz* v. *Durning, supra.* And see *Morgantown Glassware Guild* v. *Humphrey*, —— U.S. App. D.C. ——, —— F. 2d —— (decided June 7, 1956); *Patchogue* v. *Plymouth Mills Corp.*, 101 F. 2d 41 (2d Cir. 1939); *Riccomini* v. *United States*, 69 F. 2d 480 (9th Cir. 1934). The fact that an importer does not need to pay a challenged duty until this method of review has been exhausted goes far to sustain the decisions just cited. So also does the possibility that the specialized customs courts may never be required to reach the question of constitutionality: they may decide for plaintiffs on some quite unrelated ground. Plaintiffs contend that the present case is different from those cited because, they say, the specialized customs courts cannot review the constitutionality of the Act or whether the Secretary of the Treasury's findings or those of the Tariff Commission are supported by the evidence. That the jurisdic-

[2] The Government argues that the risk of liability for additional duties appears from the face of the Anti-Dumping Act itself. This seems rather unrealistic in the light of the fact that importers must usually fix prices and sell their goods as promptly as they can and in the light of plaintiffs' contention that as a practical matter they cannot keep track of the prices at which the imported items are being sold abroad. However, in Kreutz v. Durning, *supra*, the Second Circuit sustained the statute in spite of the retroactivity problem. And certainly any alleged retroactivity beyond the 120-day period could be raised in the Customs Court, as well as the question of the validity of any retroactivity during that statutory period.

tion of the Customs Court and the Court of Customs and Patent Appeals extends beyond the mere review of accuracy of appraisals and classifications of merchandise is shown by the cases noted above, and particularly those in which the Court of Customs and Patent Appeals passed on the constitutionality of the Anti-Dumping Act; see also *United States* v. *Central Vermont Ry. Co.*, 17 C.C.P.A. 166 (1929).[3] It is true that in *T. M. Duche & Sons* v. *United States*, 36 C.C.P.A. 19 (1948), cert. denied, 336 U.S. 931 (1949), and *T. M. Duche & Sons* v. *United States*, 39 C.C.P.A. 186, cert. denied, 344 U.S. 830 (1952), the court did decline to examine the validity of certain actions of the Tariff Commission and the President, but this was only because of the theory that these actions could not be reviewed by any judicial body, and not because of any limitation of jurisdiction peculiar to the Customs Court or the Court of Customs and Patent Apepals.[4]

We recognize, of course, that neither the Customs Court nor the Court of Customs and Patent Appeals appears to have the equity powers of a district court. See 28 U.S.C. §§ 1541-43, 1581-83 (1952). Thus in import duty matters, if the jurisdiction of the Customs Court and the Court of Customs and Patent Appeals is exclusive, there may be no way to obtain the equitable relief in situations of extreme hardship which the Supreme Court has occasionally permitted in internal revenue cases despite the statute[5] flatly prohibiting injunctions in tax matters. E.g., *Miller* v. *Standard*

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[3] *Cf.* 28 U.S.C. § 1583 (1952), which gives the Customs Court exclusive jurisdiction to review "the decisions of any collector of customs, *including all orders and findings entering into the same*, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury . . . ." (Emphasis supplied.)

[4] *Cf.* David L. Moss Co. v. United States, 26 C.C.P.A. 381, 103 F. 2d 395 (1939).

[5] INT. REV. CODE of 1954 § 7421. This section is applicable to tariff matters. Cottman Co. v. Dailey, *supra*. With respect to plaintiffs' requests for declaratory relief it should be noted that 28 U.S.C. § 2201 (1952), creating the remedy of a declaratory judgment, specifically excepts controversies regarding Federal taxes from those cases in which declaratory relief may be given.

Nut Margarine Co. of Florida, 284 U.S. 498 (1932); *Hill* v. *Wallace*, 259 U.S. 44 (1922). Since the threat of imposition of the dumping duty is alleged by the complaint to have forced plaintiffs out of the business of importing the type of pipe involved, the case might—as an original proposition—fall within the exceptions the Supreme Court has carved in this statute, even though (as we have noted) plaintiffs would not have to pay the additional duty until they had exhausted their remedy in the Customs Court and in the Court of Customs and Patent Appeals. But we think it is too clearly established that those courts provide an adequate and exclusive remedy in this sort of case for us to make an exception here.

Accordingly, the cause will be remitted to District Judge McGuire, sitting as a single judge, for appropriate action not inconsistent with this opinion.

So ordered.

/s/ GEORGE T. WASHINGTON
Circuit Judge

/s/ ROBERT N. WILKIN
District Judge

/s/ MATTHEW F. McGUIRE
District Judge

June 20, 1956.

2—Order of Dismissal

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1038-56

A. W. HORTON, ET AL.,
Plaintiffs,

v.

GEORGE M. HUMPHREY, ET AL.,
Defendants.

ORDER

This cause having come on for hearing before a statutory three-judge court on defendants' motion to dismiss and plaintiff's opposition thereto, and the statutory three-judge court having determined that the complaint must be dismissed as there is an adequate and exclusive remedy in the Customs Court, Court of Customs and Patent Appeals, and the Supreme Court; and the statutory three-judge court having remitted this cause to this Court, sitting as a single judge, for appropriate action not inconsistent with the opinion of that statutory three-judge court, it is this 21st day of June, 1956,

ORDERED, That defendants' motion to dismiss be and it is hereby granted.

/s/ MATTHEW F. McGUIRE
Judge

3—Finding of Dumping

DEPARTMENT OF THE TREASURY
Bureau of Customs
[T. D. 53934]

CAST IRON SOIL PIPE FROM UNITED KINGDOM

ANTIDUMPING

October 27, 1955.

After due investigation, in accordance with the provisions of section 201 (a) of the Antidumping Act of 1921, as amended (19 U.S.C. 160 (a)), the United States Tariff Commission on October 26, 1955, notified the Secretary of the Treasury of its determination that the industry manufacturing cast iron soil pipe in the United States is being, or is likely to be injured, by reason of the importation into the United States of cast iron soil pipe, other than "American pattern" cast iron soil pipe, from the United Kingdom.

Pursuant to the provisions of said section 201 (a) of the Antidumping Act of 1921, as amended, I find that cast iron soil pipe, other than "American pattern" cast iron soil pipe, from the United Kingdom is being, or is likely to be, sold in the United States at less than its fair value.

[SEAL] DAVID W. KENDALL,
Acting Secretary of the Treasury.

4—Report of Tariff Commission

UNITED STATES TARIFF COMMISSION

WASHINGTON

PUBLIC INFORMATION

For release October 27, 1955

TREASURY DEPARTMENT STATEMENT CONCERNING CAST IRON SOIL PIPE FROM THE UNITED KINGDOM

There is reproduced below the Treasury Department an-

nouncement concerning its action with respect to cast iron soil pipe from the United Kingdom.

• • • • • • • • • • • •

The Treasury Department today announced a finding of dumping with respect to importations of cast iron soil pipe from the United Kingdom. This finding was issued after notification by the United States Tariff Commission of an opinion arrived at by a majority vote, that an industry in the United States is being, or is likely to be, injured by reason of the importation of cast iron soil pipe, other than "American pattern" cast iron soil pipe, from the United Kingdom at less than fair value.

The law requires that under these circumstances a special duty be levied on importations of cast iron soil pipe other than "American pattern" Cast iron soil pipe from the United Kingdom which are sold at less than foreign market value as defined by the Antidumping Act.

The letter of notification to Treasury Secretary Humphrey from the Tariff Commission is as follows:

October 26, 1955

Dear Mr. Secretary:

Reference is made to the letter from the Acting Secretary of the Treasury, dated July 26, 1955, advising that cast iron soil pipe from the United Kingdom is being, or is likely to be, sold in the United States at less than its fair value as that term is used in the Antidumping Act, 1921, and to your letter of October 18, 1955, stating that such determination did not apply to "American pattern" cast iron soil pipe.

After investigation in accordance with the provisions of section 201(a) of the Antidumping Act, 1921, as amended, including a public hearing, the Commission, by a majority vote (Commissioners Brossard, Talbot, and Dowling), has determined that a domestic industry in the United States is being, or is likely to be, injured by reason of the importation of cast iron soil pipe, other than "American pattern"

cast iron soil pipe, from the United Kingdom at less than fair value.

The domestic industry to which the Commission's determination of injury relates was held to consist of the producers of cast iron soil pipe in the State of California (Commissioner Sutton dissenting). Commissioners Sutton and Jones disagreed with the majority of the Commission's finding that the California producers of cast iron soil pipe are being, or are likely to be, injured by reason of the importation of cast iron soil pipe from the United Kingdom at less than fair value.

Commissioner Schreiber, who, after participating in the hearing, was called to the West Coast because of illness in the family, has advised the Commission of his views in this case, and they are in accord with the views of the majority.

Sincerely yours

EDGAR B. BROSSARD
Chairman

NOTE: The letter to the Secretary of the Treasury constitutes the report in this case; no further report is available.*

5—*Letters of Secretary of Treasury*

July 26, 1955

My dear Mr. Brossard:

In accordance with section 201(a), Antidumping Act, 1921, as amended, you are hereby advised that cast iron soil pipe from the United Kingdom is being, or is likely to be, sold in the United States at less than fair value as that term is used in the Antidumping Act.

The Bureau of Customs will be glad to make available to the Tariff Commission the Bureau's file on sales or likeli-

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* *This note was appended to the official Tariff Commission report.*

hood of sales at less than fair value for the Commission's use in connection with its investigation as to whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States.

Since some of the data in such file is regarded by the Bureau of Customs to be of a confidential nature, it is requested that the Tariff Commission consider all information therein contained to be for the official use of the Tariff Commission only, and not to be disclosed to others without prior clearance with the Bureau of Customs.

Sincerely yours,

/s/ H. CHAPMAN ROSE
Acting Secretary of the Treasury

Honorable Edgar B. Brossard
The Chairman
United States Tariff Commission
Washington 25, D. C.

Oct. 18, 1955

My dear Mr. Brossard:

This will confirm advice which has been communicated informally to your office that no instances have been found of sales of "American pattern" cast iron soil pipe from the United Kingdom at less than fair value, and that our determination, communicated to you on July 26, 1955, that cast iron soil pipe from the United Kingdom is being, or is likely to be, sold at less than fair value, does not apply to "American pattern" cast iron soil pipe.

Sincerely yours,

(Signed) DAVID W. KENDALL
Acting Secretary of the Treasury

APPENDIX B

1—"28 U.S.C. 1340 Internal Revenue; customs duties

"The District Courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court."

2—"28 U.S.C. 2201. Creation of remedy

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139 § 111, 63 Stat. 105."

3—"28 U.S.C. 2202. Further relief

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964."

4—"28 U.S.C. 2282. Injunction Against Enforcement of Federal Statute; Three-Judge Court Required

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges

under section 2284 of this title. (June 25, 1948, c. 646, 62 Stat. 968)''

5—''5 U.S.C. 1009. *Judicial review of agency action*

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion

Rights of Review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and Venue of Proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts Reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of

this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for any appeal to superior agency authority.

Relief Pending Review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of Review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the require-

ments of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, § 10, 60 Stat. 243.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 474

A. W. HORTON, JOHN C. FRYER, AND CAMARGE TRADING COMPANY, INCORPORATED, APPELLANTS

v.

GEORGE M. HUMPHREY, SECRETARY OF THE TREASURY, AND THE UNITED STATES TARIFF COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OR DISMISS

Pursuant to Rule 16 of the Revised Rules of this Court, appellees move that the judgment of the district court be affirmed or, in the alternative, that the appeal be dismissed.

STATEMENT

By this suit filed in the United States District Court for the District of Columbia, appellants sought a declaratory judgment that the Anti-Dumping Act of 1921, as amended, 19 U. S. C. 160, *et seq.*, is, in part, repugnant to the United States Constitution, and that certain actions and findings of the Secretary of the Treasury and the Tariff Commission, under that Act,

are invalid. The complaint also sought temporary and permanent injunctions suspending and enjoining the operation, execution and enforcement of the Act. Upon appellants' demand, a statutory three-judge court was convened to determine the issues raised by the complaint. Appellees moved to dismiss the action because of a lack of jurisdiction in the district court. Upon consideration of this motion, the three-judge district court decided that the district court was without jurisdiction (Jurisdictional Statement, pp. 19–23) and by order dated June 20, 1956 (*infra*, p. 9) remitted the cause to a single district judge "for appropriate action". The action was dismissed on June 21, 1956 by order of a single district judge (Jurisdictional Statement, p. 24). This direct appeal from the order of June 20, 1956, purportedly taken under 28 U. S. C. 1253, followed.

ARGUMENT

Upon consideration of appellees' motion to dismiss the complaint, the three-judge district court determined that the district court was without jurisdiction of the case for the reason that Congress has vested exclusive jurisdiction of the subject matter of appellants' complaint in the Customs Court and the Court of Customs and Patent Appeals. In accordance with this determination, the three-judge court remitted the cause to a single district judge for dismissal.

Since the jurisdictional determination by the district court marked the end of its inquiry, the only question before this Court on appeal is whether the established review procedure available to appellants

in the Customs Court and the Court of Customs and Patent Appeals constitutes appellants' exclusive judicial remedy. Relevant statutory considerations clearly demonstrate the correctness of this ruling. We believe accordingly that the appeal does not present a substantial question.

1. Through the establishment of the Customs Court and the Court of Customs and Patent Appeals, with ultimate review in this Court by a writ of certiorari, Congress has established a complete method of obtaining corrective redress for asserted grievances or wrongs occurring in the operation of laws relating to the assessment and collection of customs duties. And in providing a specialized forum for considering customs controversies, Congress has gone further and, with language too clear to be subject to dispute, has provided that the jurisdiction vested in the Customs Courts shall be exclusive. 28 U. S. C. 1583 (*infra*, p. 10) declares:

> The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury. * * *.[1]

[1] To dispel all doubt as to the exclusiveness of the Customs Court's jurisdiction, Congress, in defining the original jurisdiction of the district courts, has expressly excepted from the jurisdiction of the district courts "matters within the jurisdiction of the Customs Court" (28 U. S. C. 1340, *infra*, p. 10).

Final decisions of the Customs Court are subject to review by appeal to the Court of Customs and Patent Appeals (28 U. S. C. 1541) and, in turn, "[c]ases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari." 28 U. S. C. 1256 (*infra*, p. 10).

The explicit provisions for jurisdiction in the Customs Courts—to the exclusion of the district courts—mark the continuation of a well-defined and long-established policy.[2] Thus, the courts have repeatedly recognized, even in cases which arose prior to the adoption of the explicit provision appearing in 28 U. S. C. 1583, that the Customs Courts have

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[2] Congress initiated this practice with the Customs Administration Act of 1890 (26 Stat. 131), in which it undertook the establishment of a separate specialized system of courts for the resolution of customs controversies. In the 1890 Act, Congress provided for a Board of General Appraisers (Section 12, 26 Stat. 136), which was to have jurisdiction over all protests from decisions of the collectors of customs, and appeals for reappraisement. Sections 13, 14, 26 Stat. 136–138. Under Section 15 of the 1890 Act (26 Stat. 138), the courts of general jurisdiction participated in this review procedure at the appellate level. However, even this participation was eliminated by the Tariff Act of 1909, 36 Stat. 11, 91. By that Act, Congress withdrew from the courts of appeals jurisdiction to review decisions of the Board of General Appraisers and vested that jurisdiction in the Court of Customs Appeals, which it simultaneously established. Section 29, 36 Stat; 105–107. In 1926, the Board of General Appraisers was redesignated as the Customs Court. 44 Stat. 669. In Public Law 703, 84th Congress, Second Session, Congress declared the Customs Court "to be a court established under Article III of the Constitution of the United States." The present provision for exclusive jurisdiction in that court (28 U. S. C. 1583) first appeared in the 1948 revision of the Judicial Code (62 Stat. 943).

exclusive jurisdiction in customs matters, and that, by the same token, the district courts are without jurisdiction. *Morgantown Glassware Guild, Inc.,* v. *Humphrey,* C. A. D. C., decided June 7, 1956, petition for a writ of certiorari pending, No. 389; *United States* v. *Sherman & Sons Co.,* 237 U. S. 146, 152; *Boston Wool Trade Ass'n* v. *Snyder,* 161 F. 2d 648 (C. A. D. C.); *United States* v. *Cottman Co.,* 190 F. 2d 805 (C. A. 4), certiorari denied, 342 U. S. 903; *Cottman Co.* v. *Dailey,* 94 F. 2d 85 (C. A. 4); *David L. Moss Co.* v. *United States,* 103 F. 2d 395 (C. C. P. A.); *Riccomini* v. *United States,* 69 F. 2d 480 (C. A. 9); *Patchogue-Plymouth Mills Corp.* v. *Durning,* 101 F. 2d 41 (C. A. 2); *Gulbenkian* v. *United States,* 186 Fed. 133 (C. A. 2).

2. That appellants' complaint is directed to the Anti-Dumping Act of 1921[3] in no way militates against the exclusive jurisdiction of the Customs Courts. *Cottman Co.* v. *Dailey, supra.* By Section 210 of the Act (19 U. S. C. 169, *infra,* p. 11) the assessment of a special dumping duty is made subject to appeal and protest in the same way as are other customs assessments; and Section 210 provides further that "the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law" (19 U. S. C. 169). The

[3] Act of May 27, 1921, 42 Stat. 11, as amended, 19 U. S. C. 160 *et seq.*

review jurisdiction of the Customs Courts, in terms, thus extends to "all orders and findings" (28 U. S. C. 1583) entering into the assessment of a special dumping duty in the same manner and to the same extent as with other customs assessments. Since appellants have assiduously avoided the prescribed review procedure in the Customs Courts, plainly they are in no position to question the adequacy of such review in this proceeding. Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; 767; *Franklin* v. *Jonco Aircraft Corp.*, 346 U. S. 868 (summarily reversing a statutory three-judge court in *Jonco Aircraft Corp.* v. *Franklin*, 114 F. Supp. 392 (N. D. Tex.)).

The fact that appellants' complaint in the district court includes an attack upon the constitutionality of the Anti-Dumping Act likewise affords no ground for engrafting an exception upon the perfectly adequate review procedure Congress has provided through the Customs Court and the Court of Customs and Patent Appeals. *Morgantown Glassware Guild, Inc.* v. *Humphrey*, C. A. D. C., decided June 7, 1956, petition for a writ of certiorari pending, No. 389; *Cottman Co.* v. *Dailey*, 94 F. 2d 85 (C. A. 4); *Riccomini* v. *United States*, 69 F. 2d 480 (C. A. 9). On the contrary, the presence of constitutional issues serves to emphasize the necessity for compliance with the statutory remedy available to appellants. For an observance of the customary procedures may yield a result by which the resolution of any constitutional issues may be ren-

dered unnecessary or, short of that, may result in narrowly defining such issues. *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 772–773. Contrary to appellants' assertion, "the jurisdiction of the Customs Court and the Court of Customs and Patent Appeals extends beyond the mere review of accuracy of appraisals and classifications of merchandise" (Jurisdictional Statement, pp. 21–22). If, as appellants contend (Jurisdictional Statement, pp. 8–10), substantial constitutional questions are necessary to a disposition of the case, the Customs Court and the Court of Customs and Patent Appeals are competent now, as they have been in the past, to pass upon such questions in the first instance. *Morgantown Glassware Guild, Inc.* v. *Humphrey,* C. A. D. C., decided June 7, 1956, petition for a writ of certiorari pending, No. 389; *Hampton, Jr., & Co.* v. *United States,* 14 Ct. Cust. Appls. 350, affirmed, 276 U. S. 394; *United States* v. *Towers & Sons,* 14 Ct. Cust. Appls. 421; *United States* v. *Central Vermont Ry. Co.,* 17 C. C. P. A. 166 (Customs); *United States* v. *William Prym,* 17 C. C. P. A. 180 (Customs); *Kleberg* v. *United States,* 71 F. 2d 332 (C. C. P. A.); *United States* v. *Sears, Roebuck & Co.,* 20 C. C. P. A. 295 (Customs); *United States* v. *Fox River Butter Co.,* 20 C. C. P. A. 38 (Customs), certiorari denied, 287 U. S. 628.[4]

[4] Under 28 U. S. C. 1253 (*infra,* p. 10) a direct appeal lies to this Court from "an order granting or denying * * * an interlocutory or permanent injunction in any civil action * * * required by any Act of Congress to be heard and determined by a district court of three judges." The jurisdiction of this Court

CONCLUSION

For the foregoing reasons, we respectfully submi
that the judgment of the district court should b
affirmed or, in the alternative, that the appeal shoul
be dismissed.

J. LEE RANKIN,
Solictor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
JOHN G. LAUGHLIN,
Attorneys.

NOVEMBER 1956.

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on appeal thus depends upon whether this case is one of th
limited few which was required to be heard by a three-judg
district court. *Smith* v. *Wilson*, 273 U. S. 388, 389. If th
issues appellants seek to raise are exclusively within the juris
diction of the Customs Courts, it would appear that this cas
did not require the presence of a court of three judges (see 2
U. S. C. 2282, *infra*, p. 11) and was properly remitted to
single district judge for appropriate action. *Infra*, p. 9
If a three-judge court was not required, direct appeal to thi
Court does not lie and dismissal of the appeal would, therefore
appear to be in order. *Oklahoma Gas Co.* v. *Packing Co.*, 29
U. S. 386, 391–392; *Ex parte Poresky*, 290 U. S. 30.

APPENDIX A

In the United States District Court for the District of Columbia

HOLDING A THREE JUDGE STATUTORY COURT

Civil Action No. 1038–56

A. W. HORTON, JOHN C. FRYER, AND CAMARGE TRADING CO., INC., PLAINTIFFS

v.

GEORGE M. HUMPHREY, SECRETARY OF THE TREASURY, AND UNITED STATES TARIFF COMMISSION, DEFENDANTS

Before: WASHINGTON, *Circuit Judge,* and WILKIN and MCGUIRE, *District Judges*

Order

This cause came on to be heard on the complaint, the separate motions to dismiss filed by defendants, and on plaintiffs' application for an injunction;

On consideration whereof, it is ordered by this Court that this cause be, and it is hereby, remitted to District Judge Matthew F. McGuire, sitting as a single judge, for appropriate action.

(S) GEORGE T. WASHINGTON,
Circuit Judge.

(S) ROBERT N. WILKIN,
District Judge.

(S) MATTHEW F. MCGUIRE,
District Judge.

JUNE 20, 1956.

APPENDIX B

28 U. S. C. 1253 provides as follows:

> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U. S. C. 1256 provides as follows:

> Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari.

28 U. S. C. 1340 provides as follows:

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress providing for internal revenue, or revenue from imports or tonnage except matters within the jurisdiction of the Customs Court.

28 U. S. C. 1583 provides as follows:

> The Customs Court shall have exclusive jurisdiction to review on protest the decisions of any collector of customs, including all orders and findings entering into the same, as to the rate and amount of duties chargeable and as to all exactions of whatever character within the jurisdiction of the Secretary of the Treasury; decisions excluding any merchandise from entry or delivery, under any provision of the customs laws; and the liquidation or reliquidation of any entry, or the refusal to pay any claim for drawback or to reliquidate an entry for a clerical error as provided by the customs laws.

28 U. S. C. 2282 provides as follows:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Section 210 of the Act of May 27, 1921 (The Anti-Dumping Act), 42 Stat. 15, as amended, 19 U. S. C. 169, provides as follows:

> For the purposes of sections 160–171 of this title, the determination of the appraiser or person acting as appraiser as to the foreign market value or the cost of production, as the case may be, the purchase price, and the exporter's sales price, and the action of the collector in assessing special dumping duty, shall have the same force and effect and be subject to the same right of appeal and protest, under the same conditions and subject to the same limitations; the United States Customs Court, and the Court of Customs and Patent Appeals shall have the same jurisdiction, powers, and duties in connection with such appeals and protests as in the case of appeals and protests relating to customs duties under existing law.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 474

A. W. HORTON, JOHN C. FRYER, AND CAMARGE TRADING COMPANY, INCORPORATED,
Appellants,

v.

GEORGE M. HUMPHREY, SECRETARY OF THE TREASURY, AND THE UNITED STATES TARIFF COMMISSION,
Appellees.

On Appeal from the United States District Court for the District of Columbia

APPELLANTS' REPLY IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM OR DISMISS

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IN THE

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Appellees.

On Appeal from the United States District Court for the District of Columbia

---

APPELLANTS' REPLY IN OPPOSITION TO APPELLEES' MOTION TO AFFIRM OR DISMISS

This brief in opposition to Appellees' motion to affirm or dismiss is filed pursuant to Rule 16 (3) of the Revised Rules of this Court.

ARGUMENT

1. Appellees' motion to affirm or dismiss is based solely upon the asserted exclusive jurisdiction of the Customs Courts "in the operation of laws relating to the assessment and collection of customs duties" (Appellees' Brief, p. 3). This has been conceded, *arguendo*, by Appellants (Jurisdic-

tional Statement, pp. 5, 11). But the instant action is not directed either at "assessment and collection," or at the decisions or determinations of the officials who perform assessment and collection functions, or at "customs duties."

The complaint herein is directed at agency actions which precede the "assessment and collection" procedure, just as the determination whether a foreign commodity is an "import" at all preceded assessment and collection in *In re Fassett*, 142 U.S. 479 (1892); and the determination whether certain goods were imported from a "foreign country" preceded assessment and collection in *DeLima* v. *Bidwell*, 182 U.S. 1 (1901), and *Goetze* v. *United States*, 182 U.S. 221 (1901); and the determination whether certain imports should be barred from entry preceded assessment and collection in *Croton Watch Co.* v. *Laughlin*, 208 F. 2d 93 (CA 2, 1953). In all the cited cases, jurisdiction over these "customs" matters that preceded assessment and collection was found to lie in the District Courts, rather than in the Customs Courts. In those cases, as here, it was recognized that any questions that might subsequently arise involving assessment and collection would be reviewable only in the Customs Courts. But in those cases, as here, the prior agency action deciding whether any assessment and collection functions were necessary or proper is reviewable in the District Courts.

Similarly, the complaint herein is directed at the actions of officials who have no part in the assessment and collection functions reviewable in the Customs Courts. The reviewing authority of the Customs Court is limited to "decisions of the *appraiser*" (19 U.S.C. 1501) and "decisions of the *collector*" (28 U.S.C. 1583). Similarly, the reviewing authority of the Customs Court in anti-dumping matters is specifically limited to "the determination of the *appraiser* . . . and the action of the *collector*" (19 U.S.C. 169). There is no statute granting the Customs Court reviewing authority over the actions of the Secretary of the Treasury or the

determinations of the United States Tariff Commission, Appellees herein.

Finally, the complaint herein is not directed at "customs duties," such as those involved in *Morgantown Glassware Guild* v. *Humphrey*, 236 F. 2d 670 (CA DC, 1956), and the numerous other cases cited by Appellees (Appellees' Brief, p. 5). Rather, it is directed at special additional duties, over and above the regular "customs duties," like the "additional duty" for undervaluation in *Helwig* v. *U. S.*, 188 U.S. 605 (1903), and like the "additional duty" for failure to mark imports properly in *Cotonificio Bustese* v. *Morgenthau*, 121 F. 2nd 884 (CA DC, 1941). In these cases, as here, the validity of these special additional duties over and above the regular customs duties is properly cognizable in the District Court, rather than the Customs Court.

2. Appellees cite the provisions of 28 U.S.C. 1583, authorizing exclusive Customs Court review of "the decisions of any collector of customs, including all orders and findings entering into the same . . ." (Appellees' Brief, p. 3). They suggest that this reviewing authority extends not only to the "decisions of any collector" but also to all "orders and findings" of the Secretary and the Tariff Commission having any bearing on the collector's decision (Appellees' Brief, p. 6). It is clear, both from the language of the Section and from decisions thereunder, that Section 1583 means no such thing. What it makes subject to review under the protest procedure is a decision of the collector, including any prior order or determination *by the collector* entering into his final decision. Only such an order or finding could be included within the term "decision of any collector" made subject to review.

Thus, it has long been the established rule that a valuation decision by the appraiser, although it certainly "enters into" the decision of the collector to assess duties, is not subject to review under this Section. *T.D.* 12996 (CC, 1892); *cf. United States* v. *Passavant*, 169 U.S. 16 (1898), *Robert-*

son v. *Frank Bros.*, 132 U.S. 17 (1889). Similarly, the Court of Customs Appeals has held that a protest is aimed against the decision of the collector, not against an order of the Secretary of the Treasury directing him to take such action. *Robinson Co.* v. *United States*, 14 Ct. Cus. App. 209 (1926).

More recently, in considering the specific language of Section 1583, the Ninth Circuit Court of Appeals, in *Riccomini* v. *United States*, 69 F. 2d 479, 483 (CA 9, 1934), stated its meaning as being that "every such decision, order, and finding *of a collector* may be protested and reviewed" exclusively in the Customs Court. Here, there has been no such decision, order or finding, and there is thus no support for the intimation that the Secretary's Finding of Dumping and the Tariff Commission's determination of injury are subject to Customs Court review under the provisions of Section 1583.

3. Appellees state that Appellants "have assiduously avoided the prescribed review procedures in the Customs Court" and therefore "are in no position to question the adequacy of such review" (Appellees' Brief, p. 6). There has, in fact, been no such avoidance of Customs Court review. Such review will be open to Appellants only after assessment or collection has been completed, and even then will be limited to those questions raised by such assessment or collection. There is no right to Customs Court review of those agency actions that precede assessment and collection (*supra*, p. 1). Moreover, if and when the technical issues raised in assessment and collection are presented to the Customs Court, that Court has no authority to consider major substantive issues raised by the complaint herein or to grant the relief sought (*Kleberg & Co.* v. *United States*, 71 F. 2d 332, 21 CCPA 110 (1933), and other cases cited in Jurisdictional Statement, p. 13).

4. In these circumstances, where the Customs Courts have denied their own authority to inquire into the substantive

validity of an agency action, the resolution of these problems short of the constitutional issues is possible only in the District Court, for the Customs Court has denied its power to consider the non-constitutional questions raised herein. Thus, the very circumstances that establish the absence or inadequacy of Customs Court review also impel resort to the District Court not only to provide Appellants with an adequate remedy, but also to permit possible resolution of this cause without recourse to the serious constitutional issues presented.

For these reasons, we respectfully submit that Appellees' motion to affirm or dismiss should be denied.

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